



VIA E-FILING

Roxanne Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: 3142-AA13; Proposed Rule Regarding The Standard for Determining Joint Employer Status

Dear Ms. Rothschild:

On behalf of the Job Creators Network (“JCN”) and the small businesses we represent, we present these comments in response to the Notice of Proposed Rulemaking (“NPRM”) on The Standard for Determining Joint Employer Status published in the Federal Register on September 14, 2018.

JCN is a nonpartisan organization that advocates on behalf of the 90 million people in America who depend on the success of small businesses. JCN provides business leaders and entrepreneurs with the tools to become the voice of free enterprise in the media, in Congress, in state capitols, in their communities, and in their workplaces—allowing them to hold politicians accountable to job creators and their employees. We are the voice of Main Street.

Given that small business is the principal driver of employment in this country, the franchise business model has been a big driver of social success. Many of our small business members are franchisees and utilize this model for their income and growth potential. Many of these members own multiple franchisees and hope to one day become a franchisor of an original concept. Such scalable opportunity explains why there are now roughly 760,000 franchise small businesses in the United States employing millions of people.

Many of our franchisee members are persons from economically disadvantaged backgrounds. One out of five franchise owners is a member of a minority group. Franchising is an especially common route many women take to owning their own business. The franchise model has allowed many aspiring entrepreneurs to create local success and, with other people’s capital, rapidly expand it into a national network.

If the NLRB declares franchisees and franchisers to be “joint employers,” franchisers will be liable for virtually anything that happens in thousands of small businesses. Purveyors of social justice see this as a way to make national chains take responsibility for their workers with uniform policies and higher wages. Unions see it as a wedge to organize an untapped workforce. Franchisees see it as a way to go broke.

In order for franchisees to have a reasonable chance to succeed in this country, it is critical that the Board overturn the joint employer standard implemented by the majority in the *Browning-Ferris* case. That standard has created unwarranted and unnecessary schisms between franchisees and franchisors. It is essential to the survival of franchisees that they be able to receive basic guidance, support, and advice from their franchisors.

At best, the current standard discourages franchisors from providing such support. At worst, the current standard, which provides that entities that have the potential to control another employer's employees' terms and conditions of employment are joint employers, can be construed to find that joint employment is inherent in all franchise relationships.

As you know, in a 2-1 decision, the D.C. Circuit Court of Appeals recently determined that the Board could rely on an employer's "right to control" or right to exercise "indirect control" over another company's employees as proper factors for determining joint employment. However, the Court concluded that the Board's *Browning-Ferris* standard applies the concept of "indirect control" too broadly. The Court's decision does not at all provide sufficient clarification as to what triggers a joint employment finding and it does not address the challenges that a "right to control" or "indirect control" standard imposes on small businesses, especially franchisees.

Therefore, JCN strongly supports a final rule in which the Board articulates a joint employer standard that includes, in the words of the D.C. Circuit, "legal scaffolding" that draws a distinction between an entity providing "global oversight" in a company-to-company business relationship and an entity wielding control over the essential terms and conditions of another employer's employees. The latter may be sufficient to trigger a joint employer finding, but the former cannot. Furthermore, in the interest of ensuring a clear standard that is easily understandable to the Board, labor organizations, employers, and employees, JCN supports the Board's General Counsel's proposal that the final rule: (1) list the "essential terms and conditions of employment" factors necessary to determine whether a joint employer relationship exists; (2) include an explicit provision clarifying that the exercise of control of a term and condition of employment necessary to establish joint employment is not met merely because a contract between two entities dictates a particular employment term for the individuals performing services under that contract; and (3) be only a "definitional standard."

The Challenges Imposed By *Browning-Ferris*

As explained in the General Counsel's comments regarding the proposed rule, the *Browning-Ferris* joint employment standard ignores the trademark realities that are an essential component of franchising relationships.

Federal trademark law compels franchisors to promote and protect their brands and trademarks. For example, the Lanham Act, 15 U.S.C. §§ 1051-1141, a holder of a trademark (*e.g.*, franchisors) must take affirmative steps to preserve the value of its marks, including its brand, or risk abandoning the marks. Beyond that, the Federal Trade Commission's defines "franchise" to provide that "[t]he franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation" 16 C.F.R. Part 436, §§ 436.1(h). Consequently, a franchisor that does not impose uniform brand standards and expectations risks abandoning its brand or otherwise rendering its brand worthless.

As a result, franchising has created a pathway for entrepreneurs to fulfill the American dream by opening their own businesses. The advantage of the franchise relationship is that it allows

franchisees to capitalize on their franchisor's reputation and standards to attract and inspire confidence with current and potential consumers.

As the General Counsel noted in its comments, the *Browning-Ferris* standard could be construed to be so broad as to determine that every franchise relationship constitutes a joint employment relationship *per se*. Franchisors have the ability to terminate a business relationship with a franchisee based on dissatisfaction with the franchisee for any reason (including personnel matters). Thus, one could argue that, under the *Browning-Ferris* test, such contractual reservations are alone sufficient to establish the "indirect control" of employees' terms and conditions of employment necessary to establish joint employment. As such, there is great uncertainty in the franchising community as to whether franchising relationships immediately trigger joint employment liability.

Even assuming that *Browning-Ferris* was not intended to trigger immediate joint employer status on franchisors in all circumstances,¹ the current standard is destructive to franchise relationships. The Board's broadened *Browning-Ferris* standard discourages franchisors from providing mere advice, guidance, or support to its franchisees. Specifically, franchisors fearful of being deemed to have indirect influence over its franchisees are incentivized to refrain from providing assistance to its franchisees regarding any issues that could have any impact on the franchisees' terms and conditions of employment.

Indeed, since the issuance of *Browning-Ferris*, many of our members have experienced a significant diminution with regard to the support and advice that they have received from franchisors. A significant number of franchisors have elected to take a "hands off" approach with its franchisees. Many franchisors are unwilling to provide feedback to franchisees or even answer questions from franchisees with regard to recommended business practices. Consequently, several franchisees are left on their own to figure out what operational practices work best.

Franchisees with means have been compelled to incur several thousands of dollars in additional costs to receive advice from legal counsel or business consultants. The hardships on lower-income, inexperienced franchisees that lack the means to spend significant sums of money to get advice and direction from experienced legal counsel or from business consultants have been significantly greater. Those low-income franchisees are forced to employ a "trial and error" strategy, a risky strategy that diminishes their likelihood of operational success. No matter the financial condition of the franchisee, the *Browning-Ferris* standard has created barriers between franchisors and franchisees that are antithetical to the benefits of franchising – the ability to capitalize on a franchisor's brand value and goodwill.

The challenges imposed by *Browning-Ferris* are by no means limited to franchisors and franchisees. Those same difficulties exist for any business – including, and especially, small businesses – that utilizes contractors for services entirely outside the business's areas of expertise. For example, a small retailer that hires painters, landscapers, or interior designers to

¹ The Board has yet to address the issues applying the current standard. As such, the extent to which *Browning-Ferris* governs franchise relationships remains an open issue.

make the retailer's location more attractive to consumers can be deemed a joint employer of the employees who perform that work to the extent that the retailer has the potential to impact their working conditions. The same is true of businesses that use third-party contractors to perform more regular services on their behalf, such as janitorial and cleaning services.

For these reasons, *Browning-Ferris* poses a significant obstacle to small business in the United States, and the Board should adopt a final rule that reverses this broad and unworkable joint employment standard.

The Board Should Adopt The Proposed Final Rule With Additional Clarification

JCN supports a final rule that would define "joint employment" to arise only in circumstances in which two entities actually share or co-determine essential conditions of employment. The final rule should not deem traditional franchisor-franchisee business relationships sufficient to trigger joint employment.

In addition, JCN agrees with the General Counsel's recommendation that the Board further clarify the joint employment standard by: (1) specifically identifying which "essential terms and conditions of employment" are critical in determining whether a joint employment relationship exists; (2) including an explicit provision that clarifies that the exercise of control of a term and condition of employment necessary to establish joint employment is not met merely because a contract between two entities dictates a particular employment term for the individuals performing services under that contract; and (3) expressly providing that the final rule is only a "definitional standard."

Identifying "Essential Terms and Conditions of Employment"

The phrase "essential terms and conditions of employment" is susceptible to multiple interpretations. Therefore, it would be beneficial to all parties if the Board would specifically list the essential terms and conditions of employment. The General Counsel proposes a list that includes control over "(1) the determination of wages and benefits, (2) hiring and firing of employees, and (3) discipline, supervision and direction of employees." We believe that such a list is appropriate and consistent with the Board's precedent prior to *Browning-Ferris*. See *Laerco*, 269 NLRB 324, 325 (1984); *TLI*, 271 NLRB 798, 798 (1984), *enforced sub nom.*, *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); *Management Training Corp.*, 317 NLRB 1355, 1360 (1995).

JCN also agrees with the General Counsel's suggestion that for an entity to be determined a joint employer under the Act for purposes of imposing a bargaining obligation or for vicarious liability relating to the other joint employer's breach of a bargaining obligation, the entity must control all of the listed essential terms and conditions of employment. As explained by the General Counsel's comments, requiring a putative joint employer to appear at the bargaining table when the alleged joint employer lacks the ability to control all of the essential terms and conditions of employment makes no sense and imposes further obstacles to effective and efficient bargaining.

JCN shares the General Counsel's view that an entity need not control all of the essential terms and conditions of employment in order to be found liable for any unfair labor practices of another employer unrelated to bargaining. However, liability in such circumstances should only be imposed if the alleged joint employer controls the essential terms and conditions of employment at issue in the dispute. For example, an alleged joint employer that controls employee discipline and firing of another entity's employees could be held liable for the other employer's violation of Section 8(a)(3) of the Act resulting from an alleged unlawful termination or disciplinary incident. However, that same alleged joint employer should not be deemed liable for the other employer's violation of Section 8(a)(1) if the offense is unrelated to discipline or firing and the alleged joint employer otherwise had nothing to do with the incident triggering the Section 8(a)(1) allegation. For these reasons, JCN is amenable to the General Counsel's suggestion that non-bargaining unfair labor practice liability in a joint employer situation should be limited to circumstances where "the joint employer was the bad actor or knew or should have known about the unlawful activity and did nothing to prevent or mitigate it."

Further Articulating the Necessary Level of Control

The final rule should also make clear what suffices for establishing "substantial actual control" of employees' terms and conditions of employment that is direct and immediate and not "limited and routine." As explained above, *Browning-Ferris* is nearly impossible for franchisors and franchisees to navigate because it provides that the mere potential ability of a putative employer to influence the terms and conditions of employment of another employer's employees is sufficient to trigger a joint employment finding.

Because the new rule is focused on the alleged joint employer's *actual* exercise of control over the essential terms and conditions of employment of the employees at issue, it is critical that the Board make it clear that contractual provisions alone are not sufficient to establish joint employment. Therefore, we endorse the General Counsel's proposal that the final rule clarify that the exercise of control of a term and condition of employment is not met merely because a contract between two entities dictates a particular employment term for the individuals performing services under that contract.

Definitional Standard

Like the General Counsel, JCN believes that it is critical that the prospect of joint employer liability or bargaining obligations only arise when a putative joint employer is involved in the alleged unfair labor practice or an alleged unfair labor practice cannot be adequately remedied without the participation of the joint employer or to comply with a remedial order. As explained above, it makes no sense to hold an alleged joint employer liable for actions for which it is not responsible or for which its participation is necessary to ensure compliance with the Act.

We also concur with the General Counsel's contention that a joint employer should not be required to participate in bargaining or have a bargaining obligation. As explained in the General Counsel's comments, requiring two joint employers to sit at the bargaining table poses a great risk of impeding bargaining – particularly when the interests of the joint employers do not align. Moreover, since the Act was enacted, the Board has never forced employers or labor

organizations to select specific bargaining representatives at the table. It should not do so now. It is sufficient for one of the alleged joint employers to represent both employers at the bargaining table so long as the employer at the bargaining table is authorized to enter into an agreement on behalf of both entities.


These limitations are necessary to ensure that parties cannot use the prospect of joint employment liability as a device to advance agendas unrelated to the circumstances at issue. This is critical given the overwhelming time and resources that franchisors and the franchisees have incurred as a result of organized labor's corporate campaign against the fast food industry, which has used the prospect of "joint employment" as a weapon to further the campaign. The Board should only apply the joint employment doctrine in circumstances where excluding one of the alleged joint employers from liability or from bargaining obligations would render the Act ineffective.

CONCLUSION

As stated above, JCN strongly supports a final rule that clarifies that global oversight of a business relationship or routine components of a company-to-company business agreement cannot alone trigger a joint employer finding. Furthermore, we concur with the General Counsel's recommended actions to ensure clarification as to what constitutes "essential terms and conditions of employment" and what actions are sufficient to establish "substantial, direct and immediate control" that is "not limited and routine." We also support the General Counsel's suggestion that a joint employer analysis and finding is only necessary where the alleged joint employer participated in the claimed unlawful conduct or is necessary to effectuate a remedial Board order.

By issuing a final rule consistent with these terms, the Board will properly apply and enforce its commitments set forth in the Act; allow small businesses across the country a better opportunity to succeed; and encourage more aspiring entrepreneurs to take a chance and start new businesses.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alfredo Ortiz", is positioned above the typed name and contact information.

Alfredo Ortiz
President & CEO
601 New Jersey NW, Ste. 610
Washington, DC 20001
770-852-5469 office
404-242-7691 mobile
alfredo.ortiz@jobcreatorsnetwork.com